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Nos. 499-500

In the Supreme Court of the United States

OCTOBER TERM, 1942

META BIDDLE ROBINETTE, PETITIONER

v.

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE**

ELISE BIDDLE PAUMGARTEN, PETITIONER

v.

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE**

**ON PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT**

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

These cases were consolidated for hearing and opinion in the Board of Tax Appeals and the court below. The opinion of the Board of Tax

Appeals (R. 4-9) is reported in 44 B. T. A. 701. The opinions of the Circuit Court of Appeals on hearing (R. 20-26) and rehearing (R. 39-42) are reported in 129 F. 2d 832.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 23, 1942 (R. 27-28). Petition for rehearing filed April 7, 1942 (R. 29), was granted April 21, 1942 (R. 37). On July 30, 1942, the court affirmed its previous order reversing the decisions of the Board (R. 39-42). The petition for writs of certiorari was filed October 29, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Where the settlor of a trust provides that the income is to be paid to the settlor for life, then to two others for life, the property then to go to children, if any, when they reach twenty-one, or if none, then to testamentary appointees of the survivor of the settlor and the two life tenants; is the settlor subject to gift tax under Sections 501 and 506 of the Revenue Act of 1932 upon the value of the remainder at the time of establishment of the trust?
2. Whether the grantor retained any interest other than her life estate which should be excluded in determining the value of the gift.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra*, pp. 9-13.

STATEMENT

The Board of Tax Appeals found the following facts (R. 4-7):

Elise Biddle Paumigarten was, before her marriage, Elsie Biddle Robinson. She is the daughter of Meta Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates, first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan, the trust indentures were executed on January 14, 1936, by the mother and daughter in the presence of all three.

The stepfather's will had been executed shortly before. (R. 4-5.)

Taxpayer Meta Biddle Robinette, who was then fifty-five years old, executed an irrevocable trust indenture, the Pennsylvania Company for Insurances on Lives & Granting Annuities, Edward B. Robinette, and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of \$193,546. The trustees were to pay the entire income to the grantor during her life, and on her death to her husband monthly, and on his death, to her daughter monthly for life. Upon the termination of the life estates, the trustees were to distribute the corpus to the issue of the daughter *per stirpes*, upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons, in such proportions, and for such estates as the survivor of the three should by will appoint. (R. 5.)

Taxpayer Elise Biddle Robinson, who was then 30 years old, executed an irrevocable trust indenture, the Girard Trust Company, Edward B. Robinette, and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of \$680,928.68. The trustees were to pay the entire income from the trust to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either, to the

survivor. Upon termination of the life estates, the trustees were to distribute the corpus to the issue of the grantor *per stirpes*, upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons, and in such proportions, and for such estates as the survivor of the three should by will appoint. Elise Biddle Robinson was married in April of 1936 and now has issue. (R. 5-6.)

At the same time, this taxpayer executed an irrevocable trust indenture, the Pennsylvania Company for Insurances on Lives & Granting Annuities, Edward B. Robinette, and George Earle Robinette being the trustees. The terms were identical with the Girard trust aforementioned, except as to the amount and classification of the properties. To the trustees she transferred property having a market value of \$216,709.16. (R. 6.)

The taxpayers' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures of January 14, 1936, and claimed there was no gift tax liability (R. 6).

The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at \$57,958.40, and assessed a tax of \$388.75 against her, which she paid about January 29, 1940. The Commissioner determined that the

life estates transferred to the mother and step-father were gifts by Elise Biddle Robinson, valued them at \$48,635.52, and assessed a tax of \$129.53 against her, which she paid about January 29, 1940. (R. 6-7.)

Thereafter, the Commissioner issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 14, 1936, were gifts, and determining an additional deficiency of \$3,155.57 against Meta Biddle Robinette and \$25,044.94 against Elise Biddle Robinson (R. 7).

The value of the remainder in the Meta Biddle Robinette trust was fixed by the Commissioner at \$104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by the Commissioner at \$274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred (R. 7).

Upon review the Board of Tax Appeals held (R. 9) that the remainder interests did not constitute taxable gifts but the court below reversed the decision of the Board (R. 27-28).

DISCUSSION

1. The first question is substantially similar to the one in *Smith v. Shaughnessy*, 128 F. 2d 742

(C. C. A. 2d), and since the taxpayer's petition for certiorari was granted in that case on November 9, 1942, No. 429, present term, we do not oppose the granting of the petition here.

2. Neither do we oppose the granting of the petition as to the question whether some allowance should be made for the grantors' reversionary interests in calculating the value of the remainders. The court below held, correctly, we believe, that no such allowance need be made. On the other hand, in somewhat similar circumstances, the Circuit Court of Appeals for the Fifth Circuit in *Commissioner v. McLean*, 127 F. 2d 942, held that the grantor's reversionary interest was not too remote to be valued and remanded the case to the Board with directions to determine its value and reduce the value of the gift accordingly.¹ It is our view that interests of this character may be too remote and speculative to be taken into consideration for purposes of the gift tax. Cf. *Humes v. United States*, 276 U. S. 487. However, since the issue is related to the basic question already before the Court, it would be helpful in the administration of the statute to

¹ In the *McLean* case the grantor reserved a possibility of reverter if he should survive his wife, his daughter, and any children and grandchildren of the daughter unless she should make a will disposing of the trust estate, in which event the trust estate was to go as her will directed.

have the entire matter authoritatively determined
by this Court.

Respectfully submitted.

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NOVEMBER 1942.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible;

SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

Treasury Regulations 79 (1936 ed.):

ART. 2. *Transfers reached.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Thus, for example, a taxable transfer may be effected by the declaration of a trust, * * *. Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are donatively passed or

conferred upon another, regardless of the means or device employed, constitute gifts subject to tax.

ART. 3 [as amended by T. D. 5010, 1940-2 Cum. Bull. 293]. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and their scope determined.

A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in him-

self. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life where, by an exercise of the power, the estate may be terminated or cut down to one of less value, and without restriction upon the extent to which the estate may be so cut down, constitutes an incomplete gift. Modifying the example by treating the power as confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

A donor shall be considered as himself having the power where it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, as such, is not a person having an adverse interest in the disposition of the trust property or its income.

The relinquishment or termination of a power to change the disposition of the transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the initial transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the power, and constitutes a gift of such income or of such other enjoyment taxable as of the calendar year of its receipt.

If the donor contends that the power is of such nature as to render the gift incomplete, and hence not subject to the tax as of the calendar year of the initial transfer, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument of transfer, should be submitted.

* * * * *

ART. 17. *Gifts made in property.*—A gift made in property is subject to the tax in the same manner as a gift of cash, and the amount of the gift is the value of the property at the date of the gift.

* * * * *

ART. 19. *Valuation of property.*—

* * * * *

If the gift is of a remainder or reversionary interest subject to an outstanding life estate, the value of the gift will be obtained by multiplying the value of the property at

the date of the gift by the figure in column 3 of Table A opposite the number of years nearest to the age of the life tenant. In case the remainder or reversion is subject to an estate for a term of years, Table B should be used.